V. THE FORBEARANCE TEST CONTEMPLATED BY THE COMMISSION IS FUNDAMENTALLY FLAWED

In the *Order* denying industry-wide forbearance for CMRS providers, the Commission articulates a new market-by-market standard for forbearance from the resale rule. The Commission reasons that "conditions in some geographic markets may support forbearance at the same time as the [resale] rule is still needed in other locations."[60] The *Order* then announces a list of requirements that the Commission will scrutinize before granting future forbearance petitions. The Commission's approach, however, is statutorily impermissible and inconsistent with the public interest.

A. The *Order*'s Forbearance Test Is Unnecessarily Complex and Contravenes Congressional Intent

To promote the well-known deregulatory goals of the 1996 Act, Congress outlined a straightforward forbearance standard designed to gauge the level of competition in telecommunications markets. The forbearance standard set forth in the *Order* frustrates Congress' intent because it adds an impermissible level of regulatory scrutiny not contemplated by the 1996 Act. Although Congress delegated to the Commission the responsibility to determine whether the three prongs of Section 10 have been satisfied, the Commission's *Order* does much more than that, articulating a near impenetrable barrier to forbearance.

In defense of its regulatory scheme, the Commission claims its approach will provide a "more comprehensive view of the conditions within a given geographic market."[61] The *Order*'s test, however, is not based in law. Section 10 contemplates a straightforward showing, with a

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60 *Order*, ¶ 44.

61 *Id.*, n.143.

clear Congressional preference for forbearance from regulation to the greatest extent possible. Enacting more extensive requirements for forbearance requests is fully inconsistent with the deregulatory thrust of the 1996 Act.

B. The Commission's Forbearance Test Is Impermissibly Vague and Violates the Administrative Procedure Act

In addition to imposing an unnecessary level of detail, the Commission's test includes ill-defined and unclear requirements that are impermissibly vague under the Administrative Procedure Act. A statute or regulation is void for vagueness if it "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application."[62] Any provision that fails to provide such a basic level of detail will be held unlawful and set aside as either arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.[63] The Commission's test fails scrutiny under this standard.

For example, the Commission has not explained what it means by "immediate prospects for future development of additional facilities-based competition."[64] Similarly, what information the Commission seeks to capture in reviewing "the value of service to previously unserved or underserved markets"[65] is unknown.[66] These examples demonstrate that the *Order's* test fails to

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62 *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (quoting *Connally v. General Construction Co.*, 269 U.S. 385, 391 (1926)).

63 *See* 5 U.S.C. § 703(2)(A).

64 *Order*, ¶ 44.

65 *Id.*

66 Commissioner Michael Powell referenced this concern in his dissent: "I am at a loss as what constitutes an 'unserved' or 'underserved' market let alone how we will 'value' such service." *Separate Statement of Commissioner Michael Powell, Dissenting in Part*, at 7.

give CMRS carriers reasonable notice of the Commission's requirements and appears to lack any rational basis. The vagueness and imprecision make it almost impossible for CMRS providers to know whether market circumstances warrant grant of resale forbearance and is precisely the kind of uncertainty that is susceptible to judicial challenge.[67]

C. The Commission's Forbearance Test May Lead to a Flood of Market-by-Market Filings, Consume Valuable Commission Resources, and Delay Efforts To Bring the Full Benefits of a Competitive Marketplace to the American Public or Result in Silencing the CMRS Industry

The Commission failed to consider the public consequences of its newly articulated forbearance test: administrative inefficiency, undue delays and unnecessary burdens. Under the Commission's proposed methodology, carriers will be required to file detailed forbearance petitions on a market-by-market basis. As a result, the Commission may well receive dozens of petitions for forbearance in the next twenty-four months, or the Commission may be hit by resounding silence from CRMS carriers because it seems any attempt to obtain forbearance is futile.

If carriers elect to try to meet the Commission's highly ambiguous standard presented in the *Order*, preparing these petitions will be burdensome for the parties and taxing on Commission resources, particularly since the filings would far exceed what was contemplated by Congress. The Commission claims that it will resolve requests for forbearance in an expeditious fashion, establishing expedited pleading cycles, attempting to resolve these petitions in advance of their statutory deadlines. But the statutory deadline of one year is a very long time to wait in a

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[67] *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 414 (1971) ("In all cases agency action must be set aside if the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law or if the action failed to meet statutory, procedural, or constitutional requirements.") (internal quotations omitted).

competitive marketplace and the statutory deadline was twice extended on PCIA's petition for forbearance. There is no reason for CMRS carriers to expect the Commission to act promptly. In fact, any undue delays in extending the legally required forbearance will serve only to undermine the public interest.

On the other hand, between the amorphous, open-ended nature of the test and the fact that Commission action, even if favorable, may take a year or more to obtain, carriers may decide the costs simply are too excessive. A failure to pursue relief, even if warranted, will unacceptably postpone the benefits of forbearance. These problems with the Commission's revamped forbearance test serve only to confirm the error in the Commission's refusal to grant nationwide resale forbearance.

VI. AT A MINIMUM, AUTOMATIC FORBEARANCE SHOULD OCCUR IN MARKETS WHERE FOUR CMRS LICENSEES ARE OPERATIONAL

As demonstrated above, the Commission should act at this time to grant full forbearance from Section 20.12(b) of the Commission's rules to all CMRS providers on a nationwide basis. If the Commission nonetheless perseveres in its refusal to grant forbearance from the resale requirement, the agency at the very least should adopt an objective, readily discernible test for determining whether relief should be granted in a particular market. Implementing a test of this type will provide carriers with adequate definitive guidance so that they can engage in a rational determination whether to seek forbearance.

At present, the broadband CMRS resale requirement will sunset on November 24, 2002. As noted in the *Order*, this sunset plan was premised on the Commission's conclusion that "the competitive development of broadband PCS and covered SMR services, as alternatives to

cellular, would obviate the need for an express CMRS resale requirement."[68] Accordingly, if the premise for establishing a sunset of the resale requirement is effectuated at an earlier date in the context of a specific market, the CMRS carriers in that market should be granted "automatic" forbearance from the resale requirement.

Specifically, when four CMRS licensees[69] become operational in a BTA, it would be appropriate under Section 10 to grant forbearance from the resale requirement. At that time, there would be at least four operators (*e.g.*, two cellular, one or more PCS, and one SMR) serving the public in the particular market. The Commission cannot escape concluding in that context that CMRS competition has progressed to the point where resale forbearance is required under Section 10 of the Communications Act.

To achieve the benefits of forbearance at the earliest practical date while limiting the direct burdens placed on carriers as well as the Commission, PCIA proposes that the Commission's procedure be self-effectuating. Carriers would not be required to submit an extensive, unnecessarily detailed petition to seek forbearance for a particular market. Instead, a mere notification from one of the carriers in the market would be sufficient.

The record before the Commission fully demonstrates the benefits to the public stemming from forbearance from the CMRS resale requirements. The steps outlined above will enable the Commission to expedite these benefits on a market-by-market basis consistent with the

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[68] *Order*, ¶ 32.

[69] As the Commission is well aware, there have been substantial delays in completing licensing of the C block PCS systems. Those delays should not hold hostage a finding that CMRS competition has reached such a state of development that forbearance from the broadband CMRS resale requirement is appropriate under Section 10 of the Communications Act.

Commission's previously stated premises regarding the extension of the resale rule to broadband CMRS carriers and the rule's sunset plan.

VII. CONCLUSION

The Commission erred in concluding that forbearance from the resale requirements should not be extended to all CMRS operators. Because Section 10 requires that resale forbearance be granted on a nationwide basis immediately, the Commission should reconsider this aspect of its *Order* and grant the requested relief to ensure that the public interest is most effectively served through competition instead of unnecessary regulatory intervention.

Respectfully submitted,

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September 10, 1998